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Prosecution Complex: America's Race to Convict and Its Impact on the Innocent

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Publication Information

Donovan, Kathleen M. (2014). "Prosecution Complex: America's Race to Convict and Its Impact on the Innocent." *Law and Politics Book Review* 24.7, 287-290.

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Prosecution Complex: America's Race to Convict and Its Impact on the Innocent

Abstract

In lieu of an abstract, here is the review's first paragraph:

They say the first step to curing addiction is admitting that you have a problem. Daniel Medwed's terrific book, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT, attempts to do exactly that. The thesis of the book is laid out in the first few pages: prosecutors are professionally and politically incentivized to earn the greatest number of convictions. In conjunction with vast discretion over an individual's case and powerful psychological forces that discourage prosecutors from critically entertaining the possibility of being wrong, an estimable but ultimately unknowable number of innocent people are convicted and sentenced to prison. As a result, just as with any other addiction, prosecutors' thirst for convictions ultimately ends up hurting the ones around them, sometimes for unconscionable lengths of time.

Disciplines

Political Science

Comments

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<http://www.lpbr.net/2014/07/prosecution-complex-americas-race-to.html>

PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT

lpbr.net/2014/07/prosecution-complex-americas-race-to.html

by Daniel S. Medwed. New York: New York University Press, 2012. 239pp. Cloth \$65.00 ISBN 9780814796245. Paper \$23.00 ISBN 9781479893089.

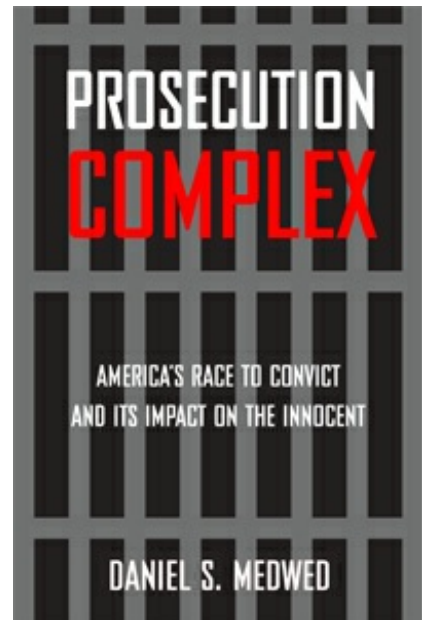
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pp.287-290

They say the first step to curing addiction is admitting that you have a problem. Daniel Medwed's terrific book, *PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT*, attempts to do exactly that. The thesis of the book is laid out in the first few pages: prosecutors are professionally and politically incentivized to earn the greatest number of convictions. In conjunction with vast discretion over an individual's case and powerful psychological forces that discourage prosecutors from critically entertaining the possibility of being wrong, an estimable but ultimately unknowable number of innocent people are convicted and sentenced to prison. As a result, just as with any other addiction, prosecutors' thirst for convictions ultimately ends up hurting the ones around them, sometimes for unconscionable lengths of time.

The book is organized into three parts that correspond to the three major phases of a criminal case: pre-trial, trial, and post-conviction. In turn, each part is composed of three chapters that detail different decision points of these phases. Part I examines charging decisions, discovery and plea bargaining. Part II examines witness prep, the use of forensic evidence, and summation. Part III outlines prosecutorial resistance to post-conviction claims of innocence, DNA testing, and continued denial of innocence even after exoneration.

Each part begins with a real-world example of a wrongful conviction that is useful in two respects. First, it puts a face on the problem, adding a sense of urgency to the need for reform. The skeptical reader might be unimpressed with the actual number of exonerated individuals, particularly given the total number of people who find their way into the criminal justice machine each year. It is much harder to discount their convictions as unfortunate but unavoidable evils when faced with the story of Stephen Schulz, for instance, who maintained his innocence and, as a result, spent four more years in prison than he



would have if he had pled guilty and accepted a plea bargain. These stories also highlight the fact that a) exonerations only occur in instances for which irrefutable evidence can be produced to the contrary (suggesting that the number of wrongful convictions is likely much larger); and b) every innocent person convicted means a guilty person that goes free, a compelling argument that Medwed mentions almost in passing.

Second, and importantly, these stories provide insight into how innocent people [*288] can be convicted. The “he must have been guilty of something” mentality is not uncommon among many who are confronted with the possibility of wrongful convictions. Thus, it is all the more shocking when seemingly simple and straightforward cases fall apart, as in the case with Bruce Godschalk, who was convicted of rape based on eyewitness testimony, forensic evidence linking him to the crime, a second witness who testified Godschalk had confessed to him while in jail, and Godschalk’s own confession of guilt. Yet fifteen years later Godschalk was released a free man. By the time the reader reaches this story, she is intimately familiar with the problems inherent in each of these pieces of evidence: the fallibility of human memory when it comes to identifying suspects; the disturbing lack of consistent, scientific rigor behind forensic evidence; the perverse incentives for jailhouse informants to lie; and the “trial tax” that encourages suspects to accept a plea bargain.

Of course, anecdotal evidence would not be convincing in isolation. As a set-up for the empirical evidence that leads to wrongful convictions, however, it is a highly effective approach. Each chapter follows roughly the same structure, by way of introducing the contours of the problem. For example, Chapter 2 on discovery outlines the legal framework provided by *BRADY V. MARYLAND* (1963), as well as its failures in practice. Similarly, Chapter 4 on witness preparation details the ethical guidelines provided to prosecutors, as well as the ways in which these guidelines fall woefully short. Chapter 7 highlights the legal and procedural difficulties in successfully bringing claims of innocence post-conviction absent the prosecutor’s assistance. Many of the chapters also bring in psychological insights to explain how prosecutors can develop a “conviction psychology”. Prosecutors are humans and, as such, are subject to confirmation biases, cognitive dissonance, and what Medwed calls “tunnel vision” (which is also known as motivated reasoning in the psychological literature).

Although I felt that the addition of these psychological insights made Medwed’s argument all the more convincing, I worry that readers not well-versed in this literature might not agree, given their relatively brief treatment and lack of detailed empirical evidence presented in the text. I also found it strange that there was not an explicit discussion of racial biases and how these can play into the conviction mentality, particularly given the overrepresentation of blacks and Hispanics as suspects and whites as prosecutors and judges. (Medwed does mention the problem of racial bias at the outset, but excuses himself from the discussion, noting that, “any effort to cover it comprehensively here... would be incomplete” (p.5). While that may be true, racial bias, both conscious and subconscious, is

an unavoidable factor in the criminal justice system and surely contributes to prosecutorial decisions as much if not more so than many of the other biases discussed in the text.) Nonetheless, by introducing readers to the psychological biases that we all fall prey to – and placing them in the context of a job that discourages recognition of such biases – we are better able to understand how smart, capable, and moral prosecutors can end up convicting innocent civilians.[*289]

Finally, and what makes this book especially worthwhile, is that it is not simply a list of horrors. Instead, each chapter concludes with thoughtful and (usually) realistic suggestions for reform. Training on the kinds of inadvertent but common mistakes made by prosecutors that can lead to false convictions is a reoccurring theme; adding this book to law school curricula would be a good start in that regard. But Medwed, perhaps because of his personal experience in the field, also smartly acknowledges that self-monitoring is insufficient. As such, he offers a number of potential reforms, including but not limited to: requiring greater disclosure by prosecutors, such as the factors motivating the decision to charge a suspect or offer a deal to jailhouse informants who testify; increasing judges' oversight of plea bargains, and opening up the discovery process by letting the defense depose the prosecution's witnesses; or even outright changing the system, including increasing the requirement for filing charges from probable cause to beyond a reasonable doubt, and eliminating the harmless error doctrine with respect to allegations of improper summations.

Indeed, it is salutary that Medwed does not place blame for false convictions solely at the feet of rogue individuals. Although there is certainly no shortage of "bad apples" – whom the author argues should be identified by name as a way to deter such behavior – the book's main focus remains on the larger psychological and institutional factors that encourage wrongful convictions by the average prosecutor, and what can be done to discourage such errors.

This book is well organized, well researched, accessible and insightful. Nonetheless, no book is perfect, and this one is no exception. In addition to what I have already noted, I would have liked a more explicit discussion regarding the degree to which missteps and mistakes at each step of the process contribute to wrongful convictions. Although Medwed occasionally mentions analyses regarding the degree to which improper summation or bad forensic science was identified as a factor in wrongful convictions, for example, it is difficult to get a sense of which parts of the system were most in need of change. A table in the introduction outlining the degree to which the problems identified in each chapter contribute to false convictions would have been helpful for absorbing the massive amount of information contained in this relatively short book (170 pages of text), given its scope.

Somewhat related, I would have welcomed a much lengthier discussion surrounding the decision to plea bargain, given that this is the outcome for over 90% of cases. Two things that deserve more attention are that case weakness appears to be the single most

consistent factor in prosecutors' decisions to offer a plea bargain, and explanations why prosecutors offer generous bargains and thus simultaneously "tax" defendants who go to trial. But these are minor quibbles, and do not change my overall review of the book, which is that it would be an excellent book for upper division undergraduate courses, and should be recommended (if not required) reading for first year law students. Perhaps exposing the next generation of prosecutors to the many ways in which false convictions occur will lead our criminal justice system down a more [*290] sober path, and spare future individuals from the suffering of being sentenced for crimes they did not commit.

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